IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

MONDAY, THE 13TH AUGUST 2007 / 22ND SRAVANA 1929

WP(C).No. 3074 of 2005(N)

AGAINST THE ORDER IN IA.NO.3322 /2004 IN
OS.294/2002 of PRINCIPAL SUB COURT,ERNAKULAM

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PETITIONERS:

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1. SMT.USHA MENON, W/O. ADITHYAN
   C1, SARANYA APARTMENTS, PUTHIYA ROAD,
   KALOOR, KOCHI-17.

2. SRI. ADITHYAN, C1, SARANYA APARTMENTS
   PUTHIYA ROAD, KALOOR, KOCHI-17.

BY ADV. SRI.ASP.KURUP
SRI.SADCHITH.P.KURUP

RESPONDENTS:

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1. KAMALA PRABHAKARAN, W/O. K. PRABHAKARAN
   `PRABHA', MUNDAKKAL LANE, PUTHUKKALAVATTOM,
   ELAMAKKARA.

2. SUNIL KUMAR, S/O. GOPALAKRISHNA MENON,
   `APPIL', PONNURUNNI, THAMMANAM POST.

BY ADV. SMT.T.D.RAJALAKSHMI
SRI.E.R.VENKATESWARAN
SRI.R.VENUGOPAL

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 13/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WPC 3074 OF 2005

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1 : TRUE COPY OF LIST OF DOCUMENT DATED 12.07.04 FILED BY THE FIRST RESPONDENT.

EXT.P2 : TRUE COPY OF COMMISSION APPLICATION DATED 15.07.04 FILED BY PETITIONERS.

EXT.P3 : TRUE COPY OF OBJECTION DATED 17.07.04 FILED BY THE FIRST RESPONDENT.

EXT.P4 : TRUE COPY OF ORDER DATED 14.10.04 PASSED BY THE SUB COURT, ERNAKULAM IN IA 3322/2004 IN OS 294/02.

/TRUE COPY/

PA TO JUDGE.

PIUS C. KURIAKOSE, J.

W.P.(C) No. 3074 OF 2005

Dated this the 13th day of August, 2007

JUDGMENT

In a suit filed against the builders, by the owners of plots upon which flats have been constructed, the defendant builders filed an application for appointment of a commission and the learned Subordinate Judge under Ext.P4, dismissed that application.

2. Heard Sri.Sajith P.Kurup, learned counsel for the petitioner and Sri.E.R.Venkateswaran, learned counsel for the respondents. It is not seriously disputed that the identity of the flats claimed by the respondents i.e., whether they are put up on land belonging to the first petitioner-Kamala Prabhakaran or to her sister-Remani will be an issue relevant for adjudication in the suit. The learned Subordinate Judge also does not say that a report as sought for in the commission application, Ext.P2, is irrelevant. According the learned Sub Judge, though identification of the apartments agreed to be given to the plaintiff may be necessary, the same can be done even without appointing a commissioner. The learned Subordinate Judge states that the plan in respect of the apartments, if produced, will be very helpful for identifying the respective portions of the flats constructed in the property of the plaintiff Kamala and her sister Remani. The learned Judge also

indicates that the agreement for sale and basic title deed will also help for locating the property of the plaintiff and her sister. Therefore the learned judge concludes that since the properties can be identified from the above referred documents, the commissioner's report as sought for is unnecessary.

I cannot agree with the learned Subordinate Judge. Though, perhaps, it may be possible to identify the land upon which the flats have been constructed with reference to the basic title deed and the documents mentioned in the order including the plan(provided the plan is an accurate one), the ideal method for resolving the controversy, in my opinion, will be to depute a commissioner and get a report as sought for in Ext.P2 application. Of course, Sri.E.R.Vekateswaran, learned counsel for the respondents submitted that since the entire land has been built up, it is not practicably possible to the have a measurement and identification. I am of the view that the said aspect is to be reported by the advocate commissioner after his first visit. Therefore, I set aside the impugned order and allow Ext.P2 IA. The court below will appoint an advocate of its own choice fixing suitable remuneration. If the advocate commissioner after his first visit files an interim report stating that a measurement as sought for is not practical,

it is open to the court below to pass appropriate orders based on that interim report.

PIUS C. KURIAKOSE, JUDGE

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